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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 HON C. LAU,
12 CDCR #V-15557,

13 Plaintiff,

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15 vs.

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17 GEORGE GIURBINO, et al.,
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20 Defendants.
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Civil No. 09-0033 L (LSP)

ORDER:

**(1) DENYING MOTIONS FOR
APPOINTMENT OF COUNSEL
[Doc. Nos. 5, 7]**

**(2) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 2];**

**(3) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING
TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

23 Hon C. Lau ("Plaintiff"), a state prisoner currently incarcerated at the Richard J. Donovan
24 Correctional Facility located in San Diego, California and proceeding pro se, has filed a civil
25 rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee
26 mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis*
27 ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with two Motions for Appointment
28 of Counsel [Doc. Nos. 5, 7].

I. MOTIONS FOR APPOINTMENT OF COUNSEL [Doc. Nos. 5, 7]

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff’s request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

II. MOTION TO PROCEED IFP [DOC. NO. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Section 1915, as amended by the Prison Litigation Reform Act (“PLRA”), further requires that each prisoner seeking leave to proceed IFP submit a “certified copy of [his] trust fund account statement (or institutional equivalent) ... for the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). Using these certified trust

1 account statements, the Court must assess an initial payment of 20% of (a) the average monthly
 2 deposit, or (b) the average monthly balance in the account for the past six months, whichever
 3 is greater, and collect that amount as the prisoner's initial partial filing fee, unless he has no
 4 current assets with which to pay. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4); *Taylor*,
 5 281 F.3d at 850. Thereafter, the institution having custody of the prisoner must collect
 6 subsequent payments, assessed at 20% of the preceding month's income, in any month in which
 7 his account exceeds \$10, and forward those payments to the Court until the entire filing fee is
 8 paid. *See* 28 U.S.C. § 1915(b)(2); *Taylor*, 281 F.3d at 847.

9 The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C.
 10 § 1915(a)(1) [Doc. No. 2] as well as a certified copy of his prison trust account statement
 11 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff's trust account currently
 12 indicates that he has insufficient funds from which to pay an initial partial filing fee.

13 Accordingly, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No.
 14 2], and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1) (court shall
 15 assess initial partial filing fee only "when funds exist"); 28 U.S.C. § 1915(b)(4) ("In no event
 16 shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has
 17 no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850
 18 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's
 19 IFP case based solely on a "failure to pay . . . due to the lack of funds available to him when
 20 payment is ordered."). However, Plaintiff is required to pay the full \$350 filing fee mandated
 21 by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison
 22 trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

23 **III. SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2) & 1915A**

24 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 25 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 26 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 27 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 28 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these

provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court's duty to liberally construe a pro se's pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

A. 42 U.S.C. § 1983

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

1 **B. Eighth Amendment Claims**

2 First, Plaintiff's Complaint is subject to sua sponte dismissal pursuant to 28 U.S.C.
3 § 1915(e)(2) because it fails to state an Eighth Amendment claim. *See Farmer v. Brennan*, 511
4 U.S. 825, 834 (1994). Plaintiff's Complaint lacks details but it appears that Plaintiff is claiming
5 he was attacked by another inmate on July 17, 2004 while he was housed at Calipatria State
6 Prison. (*See* Compl. at 2-3.) The only named Defendants in this action are Wardens Giurbino
7 and Scribner. (*Id.* at 1-2.)

8 The Eighth Amendment's prohibition against cruel and unusual punishment requires that
9 prison officials act reasonably in protecting inmates from violence suffered at the hands of other
10 prisoners. *Farmer*, 511 U.S. at 833; *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986).
11 However, to state a failure to protect claim, Plaintiff must allege facts sufficient to show that
12 Defendants were "deliberately indifferent," that they were aware of, but nevertheless consciously
13 disregarded an excessive risk to his health or safety. *Farmer*, 511 U.S. at 834. If the official
14 is not alleged to have actual knowledge of a serious risk of harm, but is alleged to be aware of
15 facts from which the inference could be drawn that a substantial risk of serious harm exists, the
16 plaintiff must further allege that the official "also dr[ew] the inference." *Id.* at 837; *Wilson v.*
17 *Seiter*, 501 U.S. 294, 303 (1991). Here, Plaintiff fails to identify any specific serious risk to his
18 safety that was known to correctional officers.

19 Without pleading such facts, Plaintiff cannot show that any Defendant acted with
20 conscious disregard to a risk to his safety. *See Farmer*, 511 U.S. at 837; *Johnson v. Duffy*, 588
21 F.2d 740, 743 (9th Cir. 1978) (to establish a deprivation of a constitutional right by any
22 particular individual, the plaintiff must allege that the individual, in acting or failing to act, was
23 the actual and proximate cause of his injury). Thus, Plaintiff's Eighth Amendment failure to
24 protect claims are dismissed for failing to state a claim upon which relief can be granted.

25 **C. Statute of Limitations**

26 Second, even if Plaintiff were able to sufficiently allege an Eighth Amendment claim, his
27 claim falls outside the applicable statute of limitations. While Congress has provided no federal
28 statute of limitations governing section 1983 claims, the Supreme Court has held that federal

1 courts should use the forum state's single most appropriate statute of limitations applicable to
 2 personal injury actions for all section 1983 claims. *See Wilson v. Garcia*, 471 U.S. 261, 269
 3 (1985). Relying on *Wilson*, the Ninth Circuit has found that the one-year statute of limitations
 4 of California Code of Civil Procedure § 340(3)¹ is the most appropriate. *Usher v. City of Los*
 5 *Angeles*, 828 F.2d 556, 558 (9th Cir. 1987); *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th
 6 Cir. 1995) (per curiam). On January 1, 2003, this code section was replaced with § 335.1 which
 7 now provides for a two-year statute of limitations for these actions. Federal law, however,
 8 determines when a section 1983 cause of action accrues. *Hardin v. Staub*, 490 U.S. 536, 543-44
 9 (1989). Under federal law, a claim generally accrues when the plaintiff "knows or has reason
 10 to know of the injury which is the basis of the action." *Elliot v. City of Union City*, 25 F.3d
 11 800, 802 (9th Cir. 1996) (internal citations omitted).

12 Plaintiff alleges that the incident in which he was injured by another inmate occurred on
 13 July 17, 2004. (*See* Compl. at 1-2.) However, Plaintiff filed this action on January 7, 2009,
 14 nearly five years after he claims that Defendants violated his constitutional rights.

15 Plaintiff does not allege any facts to suggest how or why California's two-year statute
 16 of limitations might be tolled for a period of time which would make his claims timely. *See*,
 17 *e.g.*, CAL. CODE CIV. P. § 352.1 (tolling statute of limitations "for a maximum of 2 years" during
 18 a prisoner's incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL.
 19 CODE CIV. P. § 352.1 tolls a California prisoner's personal injury claims accruing before January
 20 1, 1995 for two years, or until January 1, 1995, whichever occurs later, unless application of the
 21 statute would result in a "manifest injustice."). Pursuant to *Fink*, Plaintiff's claims against
 22 Defendants, accruing in 2004, would be tolled for two years. California's two-year statute of
 23 limitations would then begin to run -- requiring Plaintiff to file this action against these
 24 Defendants no later than July 2008.

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 28 ¹ California Code of Civil Procedure § 340(3) provides a one-year statute of limitations on any
 civil action for "[l]ibel, slander, assault, battery, false imprisonment, seduction, injury or death from
 wrongful act or neglect" CAL. CIV. PROC. CODE § 340(3).

D. Access to Courts Claim

In addition, Plaintiff makes vague allegations with regard to prison guards stealing his “legal work” which apparently led to the denial of his criminal appeal. (*See* Compl. at 4.) Plaintiff offers no dates, or names or any facts from which the Court could find that he stated a claim against any Defendant.

Prisoners “have a constitutional right to petition the government for redress of their grievances, which includes a reasonable right of access to the courts.” *O’Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996); *accord Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In *Bounds*, 430 U.S. at 817, the Supreme Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons who are trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977). To establish a violation of the right of access to the courts, however, a prisoner must allege facts sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.” *Id.* at 348; *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

Here, however, Plaintiff has failed to allege any facts to show that any named Defendant *precluded* his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction or sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right of access to the courts protects only an inmate’s need and ability to “attack [his] sentence[], directly or collaterally, and ... to challenge the conditions of [his] confinement.”); *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (the non-frivolous nature of the “underlying cause of action, whether anticipated or lost, is an element that must be described in

1 the complaint, just as much as allegations must describe the official acts frustrating the
2 litigation.”).

3 Plaintiff has not alleged that “a complaint he prepared was dismissed,” or that he was “so
4 stymied” by any individual defendant’s actions that “he was unable to even file a complaint,”
5 direct appeal or petition for writ of habeas corpus that was not “frivolous.” *Lewis*, 518 U.S. at
6 351; *Christopher*, 536 U.S. at 416 (“like any other element of an access claim[,] ... the predicate
7 claim [must] be described well enough to apply the ‘nonfrivolous’ test and to show that the
8 ‘arguable’ nature of the underlying claim is more than hope.”). Therefore, Plaintiff’s access to
9 courts claims must be dismissed for failing to state a claim upon which relief may be granted.

10 Accordingly, the Court finds that Plaintiff’s Complaint must be dismissed sua sponte for
11 failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
12 and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

13 **III. CONCLUSION AND ORDER**

14 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

15 1. Plaintiff’s Motions for Appointment of Counsel [Doc. Nos. 5, 7] are **DENIED**
16 without prejudice.

17 2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
18 is **GRANTED**.

19 3. The Secretary of California Department of Corrections and Rehabilitation, or his
20 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee
21 owed in this case by collecting monthly payments from the account in an amount equal to twenty
22 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court
23 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
24 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
25 **ASSIGNED TO THIS ACTION.**


26 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
27 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
28 Sacramento, California 95814.

IT IS FURTHER ORDERED that:

5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is filed in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

IT IS SO ORDERED.

DATED: April 3, 2009


M. James Lorenz
United States District Court Judge